UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 18 2010

REPLY TO THE ATTENTION OF:

WW-16J

U.S. Army Corps of Engineers, Louisville District
ATTN: Mr. Robert J. Brown, CELRL-OP-FW
P.O. Box 489
Newburgh, Indiana 47629-0489

Re: Public Notice No. LRL-2009-243-rjb / Black Beauty Coal Company-Knox Pit (Amendment 4)

Dear Mr. Brown:

The United States Environmental Protection Agency has reviewed Black Beauty Coal Company's (BBCC) "Response to Public Notice Comments and other requested information" dated November 10, 2010 and revised Section 404 permit materials. EPA appreciates BBCC's response to our comments of October 13, 2010, however the following permit concerns remain:

1. The applicant states that they have removed any reference to the "305 (b) list being Impaired Waters." On page 9 of the revised permit application, reference is made to the 2006 305 (b) List, listing "North Indian Creek as good and Roberson Ditch and White River as impaired." Again, the 305 (b) Report lists all the waters that have been assessed within a given cycle in the state. The 303(d) list of impaired waters, is a subset of an Integrated Report which also contains the 305(b). Please clarify the statement on page 9.

2. EPA recognizes that the Missouri Protocol criteria for assessing the existing condition of the stream has been removed from the Stream Assessment Worksheets, however, page 33 of the permit narrative references the terms "fully functional" and "functionally impaired" when describing certain types of streams onsite. This description is not meaningful or necessary in this context and should be removed from the narrative.

Furthermore, it is not clear why the riparian buffer area was removed from the Stream Assessment Worksheets. EPA recommends that the applicant revise the worksheets to include clear and accurate buffer width information.

3. Appendix B of the application includes an impact table that contains stream ID, location, flow regime, jurisdictional status and stream buffer range information for each stream segment, however, it does not identify the proposed impact (ex. mine-through, haul road crossing, etc.) or the total linear feet of each delineated stream segment. The applicant must submit a table that includes the type of impact proposed for each stream

segment and the linear feet of each stream segment delineated regardless of whether or not it would be impacted. The applicant must provide similar information for wetlands. Additionally, the applicant must provide a map of the mine design/plan that includes information about the permit limits, location of diversion ditches, top soil/overburden stockpiles, coal outcrop, aquatic resources, stream buffer zone, mining sequence, sources of hydrology such as springs and seeps, water quality monitoring stations, and location of sediment ponds. These items are necessary to appropriately document the types and locations of features onsite, and avoidance and minimization measures the applicant has undertaken to assist the Agencies in determining whether the applicant is in compliance with the 404(b)(1) Guidelines.

4. The applicant has chosen four parameters of the EPA Rapid Bioassesment Protocol (EPA RBP) to set mitigation performance standards for. They include pool variability, flow status, channel sinuosity and bank stability. Although each of these parameters is important in gauging stream development, the applicant can not pick and choose the parameters in the EPA RBP to set performance standards for. The applicant must set standards associated with the overall EPA RBP score for each mitigation reach. The special conditions of the Corps permit should include general standards for the overall EPA RBP score.

5. The applicant did not address our comment on financial assurances and long-term protection of the mitigation area. The applicant must discuss financial assurances with the U.S. Army Corps of Engineers. Financial assurances must be addressed before the Section 404 permit is issued. Financial assurances for compensatory wetland and stream mitigation for 404 purposes are distinct from those required by the Surface Mining Control and Reclamation Act (SMCRA). The costs of the planning, construction, monitoring, and maintenance costs of mitigation activities should be considered. The Corps cannot evaluate whether the financial assurances are sufficient to cover potential mitigation inadequacies without this type of information. Furthermore, the applicant makes reference to deed restrictions on page 32 of the application but does not indicate whether or not they have committed to placing a deed restriction on the mitigation areas. The applicant should provide legal protection of the mitigation sites long-term. Financial assurances and long-term protection of the mitigation areas must be included as conditions of the Section 404 permit.

6. The applicant stated in their response that they removed all in-lieu fee language. On page 46 of the revised application, the applicant makes reference to in-lieu fee. That language must be removed.

Bio-Assessment Report

The Corps recently provided EPA a copy of the revised Bio-Assessment Report dated September 24, 2009. EPA provides the following comments based on our review of this document:

a) Please remove all references in the Bio-Assessment Report to small drainage areas being a cause of impairments. Headwater streams are an important part of the river continuum. Headwater streams located in the upper reaches of stream networks are associated with small drainage areas. Further, the amount of water in the upper headwaters may be a limiting factor in the presence and/or diversity of particular biological communities, but it is not the cause of impairment.

b) The report and quality assurance plan discuss two methods for the collection of macroinvertebrates, however, it is not specified which method was used at each of the three sampling locations. Please further define and explain the methods used for the assessments.

c) In section 4.0 Results, subsections are numbered 4.1 then jump to 4.3. Please include a section that shows the results of the physical evaluations of the assessed streams which would correlate to the methods listed in section 3.2.

d) The general Section 5.0 Discussion lacks structure and the grouping of related ideas which has caused difficultly in the EPA's evaluation of the completeness and content of the data analysis. Due to the lack of clarity, EPA requests all of the field data sheets for the stream assessments.

e) The applicant asserts that "the EPA Habitat evaluation...does not consider drainage area or slope when scoring habitat and also doesn't reflect another important character of the streams at the Knox Pit site. This is likely due to the regional specificity of the Ohio QHEI. IDEM's Assessment Branch uses the Ohio QHEI in assessing whether or not its streams are determined to have impaired biotic communities due to habitat or other reasons."

There are a few issues associated with this excerpt. First, EPA's methodology does account for slope as the habitat assessments are based on the stream being a high gradient or low gradient stream. If the rapid assessment was done for the wrong gradient the results could be skewed as definitions of the condition category differ between high and low gradient streams for each habitat parameter. Second, the discussion references "another important character of the streams at the Knox Pit," however no mention is made to what the unevaluated "character[sic]" is at the Knox Pit site. Finally, the next sentence in this excerpt focuses on the Ohio QHEI being regionally specific. However, the previous sentence does not discuss the Ohio QHEI and there is neither a stated component lacking in the Ohio QHEI nor a discussion of a why Ohio QHEI parameters are not applicable to this site. Please clarify this statement.

f) In the section of the discussion associated with EPT scoring categories, the applicant needs to remove the statement "except in 1NS8 which received a score of 2 in the total number of individuals category" because, according to the data provided, all streams did score a total of zero in the "total number" of individuals.

g) There is a reference to stream "1MS1" in this section. Please clarify which stream this is as it is not one of the three sites that were biologically monitored."

h) The applicant asserts that "headwater streams area also less able to derive energy and food materials from the stream itself though autochthonous methods and with less drainage area provide less food and habitat for instream fauna." These headwater streams, and their associated wetland and riparian systems, improve water quality by diluting and filtering pollutants from surface water runoff, reducing sediment loads and siltation downstream, maintaining the hydrological and physical dynamics of receiving waters, and providing processed leaf litter and organic matter, which are important to sustaining biological communities and beneficial uses of downstream waters. Combined, organic interactions and improvements in water quality and stream channel conditions of these headwater streams provide habitat for aquatic fauna that depend upon seasonally flooded habitat for advancement in their life cycle. In turn, aquatic fauna contribute to the overall biodiversity of the watershed.

In conclusion, EPA continues to object to the issuance of a permit for the project as proposed. While we recognize that BBCC has addressed some of our comments, there are still a number of unresolved issues that must be addressed and information that must be provided to the Corps before an informed permit decision can be made. Please keep EPA apprised of any response to these comments. Please feel free to contact Melissa Gebien of my staff at 312-886-6833 with any questions.

Sincerely,

Wendy L M

For Peter Swenson, Chief
Watersheds and Wetlands Branch

cc: Marylou Poppa Renshaw, IDEM
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